UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 20-3441

FLANDREAU SANTEE SIOUX TRIBE, a Federally recognized Indian Tribe,

Plaintiff-Appellee,

v.

JAMES TERWILLIGER, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE HONORABLE KAREN E. SCHREIER
United States District Court Judge

DEFENDANTS-APPELLANTS' BRIEF

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SUMMARY OF THE CASE AND ORAL ARGUMENT REQUEST

The Flandreau Santee Sioux Tribe contracted with a non-Indian contractor to renovate and expand the Tribe's casino located on its reservation. While the State imposes a two percent tax on a contractor's gross receipts for construction services, certain construction projects on Indian country are exempt from tax pursuant to federal law. The State determined that the non-Indian Contractor's construction services related to the casino renovation and expansion did not qualify for the tax exemption and thus were subject to the contractor's excise tax.

The Tribe filed this lawsuit, challenging the State's authority to impose the tax on the contractor. After a bench trial, the district court issued an Order in favor of the Plaintiffs. The district court determined that 1) based on the *Bracker* balancing analysis, the imposition of the contractor's excise tax is preempted under IGRA, and 2) under the Indian trader statutes the tax is expressly preempted under federal law.

The State requests 30 minutes to present oral argument that the district court's ruling is contrary to established law.

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JURISDICTIONAL STATEMENT

On April 21, 2017, the Tribe filed a Complaint in the United States District Court, District of South Dakota, challenging the imposition of a state tax on a non-Indian contractor for construction services at the Tribe's casino on the Flandreau Indian Reservation.[1] APP 001-017. The district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

On July 16, 2018, the district court entered an Order Granting Plaintiff's Motion for Summary Judgment in Part and Denying in Part and Denying Defendant's Motion for Summary Judgment in Part but Dismissing Plaintiff's Fourth Claim without Prejudice.

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[1] Throughout this brief, the Defendants and Appellants, James Terwilliger, Secretary of the South Dakota Department of Revenue, and Kristi Noem, Governor of the State of South Dakota, are referred to as "the State"; and Plaintiff and Appellee, Flandreau Santee Sioux Tribe, is referred to as "the Tribe." The State's Appendix is cited as "APP"; the Addendum is cited as "ADD"; and docket entries filed in the District Court Clerk's record, 4:17-CV-04055-KES, are cited as "Doc." followed by the docket number.

Other abbreviations used throughout the brief are as follows: "Department" means the South Dakota Department of Revenue; "IGRA" means the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; "NIGC" means the National Indian Gaming Commission; "Interior" means the United States Department of Interior; and "BIA" means the federal Bureau of Indian Affairs.

Doc. 102, 103. A Judgment was filed on July 16, 2018, and the State timely filed a Notice of Appeal to this Court on August 14, 2018. Doc. 102 at 21-22; Doc. 108. On September 6, 2019, this Court reversed and remanded. Doc. 121, 122; *see also Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019).

A video bench trial was held beginning on June 23, 2020. Doc. 167. On October 21, 2020, the district court issued a Memorandum Opinion and Order in favor of the Plaintiffs. ADD 001-121. A Judgment was filed on October 21, 2020, and the State timely filed a Notice of Appeal to this Court on November 20, 2020. ADD 122; Doc. 195.

STATEMENT OF ISSUES

1. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE IMPOSITION OF CONTRACTOR'S EXCISE TAX ON HENRY CARLSON COMPANY IS EXPRESSLY PREEMPTED UNDER THE INDIAN TRADER STATUTES?

Sac & Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000)

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980)

U.S. ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980)

Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965)

2. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT, BASED ON THE BRACKER BALANCING TEST, THE IMPOSITION OF CONTRACTOR'S EXCISE TAX ON HENRY CARLSON COMPANY IS PREEMPTED UNDER IGRA?

Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008)

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989)

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982)

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)

STATEMENT OF THE CASE AND FACTS

I. Factual Background

The Tribe is a federally recognized Indian tribe whose reservation, the Flandreau Indian Reservation, is wholly within Moody County, South Dakota. APP 034 ¶1; Exhibit 146. Within the reservation, the Tribe owns and operates the Royal River Casino and Hotel (Casino). APP 034 ¶2.

The State and the Tribe have maintained a Tribal-State gaming compact (Compact), entered into pursuant to the Indian Gaming Regulatory Act (IGRA), which regulates Class III gaming

activities at the Casino. APP 038 ¶¶ 23-24; *see also* Exhibits 17-18. The Compact does not contain provisions specifically relating to construction standards, construction activities, or the taxation of construction activities at the Casino. *Id.*

The Tribe planned a $24 million renovation and expansion of the Casino (the Construction Project), which includes adding slot machines, a VIP lounge, and casino administration offices, as well as relocating the bar and renovating the casino cage area, snack bar, restaurant, and hotel. APP 041-042 ¶ 38; *see also* Exhibits 32-33; Doc. 65 ¶10. Phase 1 of the Construction Project involved:

> 1) Construction of a new administration building for the Casino attached to the existing main Casino building, to house all administrative offices for the operation; and
> 2) renovation of the currently vacant bingo hall located on the north side of the main Casino building, to provide additional gaming space and a VIP area for Casino guests.

[hereinafter, "Phase 1"]. Exhibit 197.

The Tribe retained an architect for the Construction Project in July 2015. APP 041 ¶¶ 36-37. In October 2015, the Tribe contracted with a non-Indian construction company, Henry Carlson Company (Contractor), as the contractor for the Construction Project. APP 039-041 ¶¶ 33-34; see also Exhibits 23-31. The

Contractor's shop is located in Sioux Falls, South Dakota, which is approximately 35 miles away from the Tribe's reservation. APP 041 ¶35. Actual construction for the Construction Project began about December 1, 2016. Doc. 65 ¶21.

Pursuant to SDCL chapter 10-46A, a contractor's gross receipts are subject to a two percent contractor's excise tax if: (1) its services are enumerated in Division C (construction) of the Standard Industrial Classification Manual of 1987; or (2) its services "entail the construction, building, installation, or repair of a fixture to realty[.]" *See* SDCL 10-46A-1, -2, -2.2. The legal incidence of this tax is on the contractor. APP 032 ¶9. The contractor may pass the tax to its customers, but it is not required to do so. *See* SDCL 10-46A-12 (providing that "[a] contractor may list the contractor's excise tax . . . as a separate line item on all contracts and bills[.]") (emphasis added). Using funds generated in part by contractor's excise tax revenue, the State provides a substantial number of governmental services to entities and individuals within its borders. Exhibit 1001.

While there are few state statutory exemptions from contractor's excise tax, certain construction projects located within

Indian country are exempt pursuant to federal law. APP 032 ¶10; *see* SDCL 10-46A-18, -18.1. The South Dakota Department of Revenue (Department) administers this exemption by having contractors or project owners complete an Indian Country Project Request for Exemption.[2] Adam's Testimony, APP 072-085. After receiving an Indian Country Project Request for Exemption, the Department analyzes the circumstances surrounding each construction project to determine whether the project qualifies for the exemption. *Id.*

Consistent with the above, the Contractor submitted to the Department an Indian Country Project Request for Exemption for Phase 1 of the Construction Project. Exhibit 197. After its review, the Department denied the request. Exhibit 1003; *see* Adams Testimony, APP 084-086. Subsequently, the Tribe submitted a second Indian Country Request for Exemption for Phase 1, which was also denied by the Department. Adams Testimony,

[2] The Indian Country Project Request for Exemption has been referred to as "Indian Use Projects" or "Indian Use Only Projects", but the Department has made efforts to eliminate such references from its publications.

APP 085-086.

During the course of the Construction Project, the Contractor has remitted to the Department the tax which the Contractor identified as relating to the Construction Project. *See* Exhibit 1003. The Contractor indicated it was paying the tax under protest pursuant to SDCL 10-27-2 and requested that the Department refund that tax to the Tribe. Exhibit 1003. The Department denied the refund requests and informed the Contractor that it may request a hearing regarding the denials. *Id.*

II. Procedural History

The Tribe filed this federal lawsuit on April 21, 2017, alleging that the contractor's excise tax on Phase 1 of the Construction Project is preempted by federal law, including IGRA, Indian trader statutes, and the standards set forth by the Supreme Court, and that the tax infringes on the Tribe's sovereignty. APP 001-017. Through its Complaint, the Tribe also sought a refund of "contractor's excise tax paid, or to be paid, under protest" to the State by the Contractor. *Id.*

After engaging in discovery, both the State and the Tribe moved for summary judgment. Doc. 31, 66. On July 16, 2018, the

district court issued an Order regarding the parties' motions for summary judgment ("Decision"). Doc. 102, 103. In the Decision, the court applied the *Bracker* balancing test, which provides that federal and tribal interests are weighed against the state's interests "to determine whether, in the specific context, the exercise of state authority would violate federal law." Doc. 102 at 5-7; *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145. In applying this test, the district court concluded that IGRA preempts the contractor's excise tax on the Construction Project. *See* Doc. 102 at 6-13. The district court also concluded that "the State's interests in imposing the excise tax do not outweigh the tribal and federal interests in promoting self-sufficiency[.]" Doc. 102 at 21. For these reasons, the district court held that the State had no authority to impose its tax on the non-Indian Contractor for the Construction Project. *Id.* The court dismissed the Tribe's claim for a refund of tax paid by the Contractor for lack of jurisdiction. Doc. 102 at 22. The State appealed the district court decision. On September 9, 2019, this court issued an Order reversing the district court's granting of summary judgment in favor of the tribe and remanding for further proceedings. Doc. 122.

A six-day video bench trial was held beginning June 23, 2020. On October 21, 2020, the district court issued an Order in favor of the Plaintiffs. ADD 001-121. The district court determined, based on the *Bracker* balancing analysis, that the imposition of the contractor's excise tax is preempted under IGRA. ADD 120. The court further determined that the imposition of the tax is expressly preempted under federal law, specifically the Indian Trader Statutes. ADD 120-121. The State now appeals.

SUMMARY OF THE ARGUMENT

This court previously determined that the State tax on the non-Indian Contractor for the Construction Project was not preempted by federal law. It is now asked to determine whether the Indian trader statutes preempt the State tax on the Construction Project. They do not. The Indian trader statutes are inapplicable, as they apply to goods – not services. Even if they are considered, the statutes as associated rules are defunct, unenforceable, and certainly cannot amount to the comprehensive and pervasive federal regulation of Henry Carlson Company's construction services necessary to preempt the State tax.

Since the State tax is not expressly preempted by federal law, either through IGRA or the Indian trader statutes, the issue in this case, again, "turns upon whether the imposition of the excise tax on nonmember contractors for the construction services performed on the Reservation is preempted under the *Bracker* balancing test." *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d at 945; *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. at 149. Based on the record and consistent with this court's previous *Bracker* analysis, IGRA and its implementing regulations do not comprehensively regulate the Construction Project. IGRA's federal regulatory scheme concentrates on the operation of the casino games. Comprehensive regulation of the operation of games at a tribal casino does not equate to the comprehensive regulation of the Construction Project at issue here.

Clear evidence that IGRA's scope does not include the contractor's excise tax exists as the tax may not be included in a gaming compact entered into under the provisions of IGRA. Pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii), IGRA permits gaming compacts to contain provisions for subjects that are "directly related to the operation of gaming activities." But that provision must be

construed narrowly. Under such narrow construction, the contractor's excise tax as applied here is not included. Moreover, tribal interests in self-government and self-sufficiency do not justify preemption of the State tax. In light of the substantial number of State services available to the Contractor and the minimal federal and tribal interests implicated, the State has the authority to impose the tax on the non-Indian Contractor in this case.

STANDARD OF REVIEW

The State challenges the determination that federal law preempts the imposition of the South Dakota contractor's excise tax. "After a bench trial, this court reviews legal conclusions de novo and factual findings for clear error." *Howard v. United States*, 964 F.3d 712, 716 (8th Cir. 2020). Questions of law, including the interpretation and application of a federal statute, are reviewed de novo. *United States v. Tebeau*, 713 F.3d 955, 959 (8th Cir. 2013); *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999).

ARGUMENT

Except for the cost of the Construction Project marginally increasing and an Indian trader statute claim, this appeal is substantively similar to the claims that were previously submitted

to and decided by this Court on appeal of the district court's grant of summary judgment – this case still centers on a "generally applicable one-time tax on non-member contractor construction services." *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941. Again, this Court is asked to review the district court's decision. Since both this Court and the district court have held that South Dakota's contractor's excise tax was not expressly preempted by IGRA, the State will begin with the Indian trader statutes and then discuss the *Bracker* balancing test.

I. Indian trader statutes are not a barrier to State jurisdiction

The court erred when it held that the Indian trader statutes, 25 U.S.C. sections 261 through 264, are federal interests sufficient to preempt the contractor's excise tax on the Contractor. ADD 120.

The original Indian trader statutes were enacted in 1790 by the first Congress and were found in the very first compilation of federal statutes. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688 (1965). The most recent Indian trader statute was passed in 1903. *See* 25 U.S.C. § 262 credits. Through the Indian trader statutes, Congress aimed to "prevent fraud and other

abuses by persons trading with Indians." *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 70 (1994).

Section 261 grants the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Section 262 indicates that an individual, if approved by the Commissioner, may trade with Indians on an Indian reservation under rules set by the Commissioner. Next, section 263 authorizes the President to revoke, under certain circumstances, an individual's status as an Indian trader. Finally, section 264 provides the punishment for traders that have not obtained a license under these statutes: "Any person other than an Indian of the full blood who shall attempt to . . . introduce goods, or to trade [on any Indian reservation], without [an Indian trader] license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . . ."

A. The Indian Trader Statutes do not apply to the Construction Services.

First, the Indian trader statutes do not apply here because they only govern the trade of goods on Indian reservations; the statutes do not govern the trade of services. *See* 25 U.S.C. §§ 261, 263, 264. In this case, the tax is imposed on the Contractor's services. Thus, the Indian trader statutes are not implicated.

More than fifty years after the Indian trader statutes were enacted, the Commissioner of Indian Affairs promulgated regulations regarding the Indian trader statutes. *See* 22 F.R. 10670 (Dec. 24, 1957). These regulations purport to include both goods and services in the Indian trader licensing scheme. *See* 25 C.F.R. § 140.5 ("Trading" means buying, selling, bartering, renting, leasing, permitting, or any other transaction involving the acquisition of property or services.) (emphasis added). But the regulation's expansion to include the trade of services exceeds any rulemaking authority granted by the Indian trader statutes: if a federal agency can "enlarge [a] statute at will . . . [s]uch power is not regulation; it is legislation." *See United States v. George*, 228 U.S.

14, 22 (1913). Any regulation regarding the trade of services on Indian reservations is invalid and unenforceable.

The trial court held that the Commissioner's rules regarding the Indian Trader Statutes should be accorded *Chevron* deference. ADD 110. The United States Supreme Court has held that courts may defer to an agency's interpretation of its own statutes. *Chevron v. Natural Resources Defense Counsel* 467 U.S. 837, 842 (1984).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

The court did not specifically address the first prong of the *Chevron* analysis to determine if the plain language of the Indian trader statutes was ambiguous. The plain language specifies that the Indian trader statutes apply to the sale of goods, with no mention of services; there is no ambiguity and *Chevron* deference is

not appropriate. Because the Commissioner of Indian Affairs clearly exceeded its authority by expanding the Indian trader statutes to include the sale of services the plain language of the statutes should control.

B. Even if the Indian trader statutes apply to services, they are not comprehensive and pervasive regulation of the Construction Services.

Even if the Indian trader statutes encompass services, the court erred when it held that they preempt the imposition of the contractor's excise tax. The Indian trader statutes are not comprehensive and pervasive federal regulation of the Construction Services because the statutes essentially provide no de facto regulation of the Construction Services. The court correctly held that the Tribe was unable to procure an Indian trader license application from the BIA because, based on its communication with the BIA, the Tribe "couldn't do such a thing in [the Tribe's] area." ADD 20. Accordingly, neither the Contractor nor its representatives are licensed Indian traders pursuant to the Indian trader statutes. *Id.* Because it was impossible for the Contractor to obtain a license, the Indian trader statutes are irrelevant here.

U.S. ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980), supports this conclusion. In that case, the Eighth Circuit ruled that an unlicensed Indian trader cannot be held liable for statutory penalties under the Indian trader statutes if the trader was unable to obtain a license because "bureaucratic nonfeasance [by the Secretary of Interior made] it impossible to obtain the federal trader's license[.]" *See U.S. ex rel. Keith*, 634 F.2d at 403. Likewise, the Indian trader statutes cannot be enforced against the Contractor in this case. As follows, if the statutes cannot be enforced against the Contractor, they cannot amount to comprehensive and pervasive federal regulation of the Contractor's Construction Services.

The Indian trader regulations are just as defunct as the statutes. 25 C.F.R. section 140.22 requires the "superintendent [to the Commissioner of Indian Affairs] to see that the prices charged by licensed traders are fair and reasonable." This rule, however, is not enforced in this case. No federal agency has been involved in the Project's contract process between the Tribe and the Contractor to ensure that the Contractor is charging a fair price for the Construction Services. APP 032-033 ¶¶16, 17, 18, 19.

The Supreme Court has held that the Indian trader statutes preempted a state tax on the sale of goods in two instances. First, in *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965), the Supreme Court determined that the Indian trader statutes preempted a state income tax on a non-Indian retailer for its sales made to reservation Indians on the reservation. *Id.* at 691-92. At the time of *Warren Trading Post Co.*, the Indian trader statutes were enforced, as evidenced by the retailer's licensure under the statutes. *Id.*

Also, in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), the Supreme Court ruled that the Indian trader statutes preempted a state sales tax on an unlicensed non-Indian retailer of farm machinery sold to an Indian on a reservation. *Id.* at 161-62, 165-66. Although the retailer was not a licensed Indian trader, the Supreme Court indicated it was the existence of the Indian trader statutes and regulations that preempted the tax. *Id.* at 164-65. Importantly, although the non-Indian retailer was unlicensed, the Court noted the federal regulation and oversight in the contract. *Id.* at 164 n.4, 165. Seeming to fulfill the obligation to see that reasonable prices are

charged, the BIA had approved the transaction, the contract of sale, and the tribal budget, which allocated money for the purchase of the machinery. *Id.* at 164 n.4. Here, as stated above, there was no similar federal involvement. APP 032-033 ¶¶16, 17, 18, 19. Ultimately, neither case offers guidance because this case involves the sale of services and the Indian trader statutes and regulations are defunct.

The Supreme Court has chipped away at any notion that the Indian trader statutes are comprehensive and pervasive regulation. In *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, the Court concluded that the Indian trader statutes do not preempt all state regulation of Indian traders. *Id.* at 75 (authorizing state regulation of Indian traders that "is reasonably necessary to the assessment or collection of lawful state taxes."). *Milhelm* eliminates the possibility that the Indian trader statutes impliedly preempt state law because the statutes occupied the field of Indian trading on reservations.

Supporting the insignificance of the Indian trader statutes, the Tenth Circuit has accorded little, if any, weight to the statutes. In *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, (10th Cir.

2000) the Tenth Circuit rejected a tribe's argument that the Indian trader statutes preempted a state tax on motor fuel that was sold by a distributer to a tribe's retail gas stations. *Id.* at 569, 582-83. The Court held:

> The Kansas motor fuel tax law imposes a non-discriminatory tax on all wholesale fuel distributers for fuel distributions to retailers within the State of Kansas- Indian or otherwise. Nothing in the record indicates the Tribes' distributors distribute all their fuel, or even a significant portion of it, to the Tribes. Thus, the threat of distributers perpetrating fraud or abuse upon the Tribe appears negligible. . . . We conclude that the Indian trader statutes do not so pervade the field that they preempt the Kansas motor fuel tax, the legal incidence of which falls upon the distributors and which imposes only an indirect burden on the Tribes.

Id. at 582-83.

The facts here require the same outcome as *Sac & Fox Nation*. Here, the tax is a non-discriminatory state tax imposed on the gross receipts of contractors performing construction work in South Dakota. *See* SDCL chapter 10-46A. There is no indication that the Contractor or Architect perform construction work only for the Tribe. APP 033 ¶24, 26. Thus, the threat of fraud or abuse on the Tribe is slight, if any. For these reasons, the Indian trader statutes do not preempt the tax on the non-Indian Contractor.

II. Utilization of the *Bracker* balancing test does not implicate the preemption of the imposition of contractor's excise tax on Henry Carlson Company.

Since South Dakota's contractor's excise tax is not expressly preempted by federal law, either through IGRA or the Indian trader statutes, the issue in this case "turns upon whether the imposition of the excise tax on nonmember contractors for the construction services performed on the Reservation is preempted under the *Bracker* balancing test." *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d at 945; *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586, 65 L.Ed.2d 665 (1980). In *Haeder*, this Court provided the roadmap for how this issue must be analyzed.

> In conducting [the *Bracker*] analysis, we focus on "the extent of federal regulation and control, the regulatory and revenue-raising interests of states and tribes, and the provision of state or tribal services." Felix S. Cohen, *Handbook of Federal Indian Law* 707 (2012), citing *Cotton*, 490 U.S. at 176-77, 186-90, 109 S.Ct. 1698; *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 161-63, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980); and *Bracker*, 448 U.S. at 150-51, 100 S.Ct. 2578. Federal policies reflected in IGRA and the history of tribal independence with respect to gaming, to the extent they are implicated, may preempt the tax unless the State's interest in applying the tax to Henry Carlson Company's work on the Casino is sufficient to overcome them. *See New Mexico v. Mescalero Apache*

Tribe, 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Utilizing these factors, the court erred in determining that the contractor's excise tax is preempted under IGRA.

A. The extent of federal regulation and control is minimal.

IGRA does not establish a strong federal interest in construction. The district court determined that IGRA provides a strong federal interest in the construction of tribal gaming facilities. ADD 40. The district court bases this determination on one sentence, which states the "Chairman of the NIGC approve, a resolution that provides that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety[.]" 25 U.S.C. § 2710(b)(2)(E)." ADD 40. Such a sentence can hardly be considered "comprehensive and pervasive" as it relates to construction. *See Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982) ("Federal regulation of the construction and financing of Indian education institutions is both comprehensive and pervasive.")

IGRA regulates gaming not construction. "Simply put, IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008). In *Yee*, the court, while assessing the federal interests triggered by the tax under the *Bracker* balancing test, determined that IGRA comprehensively regulates Indian gaming not construction materials. *Id.* Thus, an electrical subcontractor could not avoid paying tax on materials purchased for a project within a tribe's casino. *Id.* Similarly, in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2013), the Second Circuit determined that IGRA did not "expressly or by plain implication" preempt a Connecticut state personal property tax on lessors of slot machines at the tribe's casino because the tax did "not affect the [t]ribe's 'governance of gaming' on its reservation[.]" *Id.* at 460, 467, 469 (citing *Yee,* 528 F.3d at 1192) (also stating that "any preemption of the 'field' of gaming regulations is not at issue here, where the state tax on property [slot machines] is not targeted at gaming") (emphasis added). *See also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 487 (1998) (state public

record laws were not preempted by IGRA, as the laws "do not seek to usurp tribal control over gaming nor do they threaten to undercut federal authority over Indian gaming."). The same should be found in this case.

"Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001). The district court determined that because the Construction Project was to renovate a casino, IGRA controls. ADD 40. Even though IGRA may address construction tangentially, it was not designed to control the construction process. *Id.* IGRA's purpose is to regulate the operation of gaming by an Indian tribe. 25 U.S.C. § 2702.

As in *Yee*, *Harrah's*, and *Ledyard*, the generally applicable tax here does not affect the Tribe's ability to regulate its gaming to "assure that gaming is conducted fairly and honestly[,]" and even if it does, any effect would be *de minimus*. See 25 U.S.C. § 2702(2). If IGRA does not preempt a state tax on construction materials used at a casino, certain claims regarding gaming management and a service contract, or a state personal property tax on slot machines,

then it does not preempt a contractor's excise tax on the Construction Project.

The Indian trader statutes also do not provide the comprehensive or pervasive federal regulation required under the *Bracker* balancing test. The district court determined that federal regulation is shown as every individual trading with Indians on-reservation is subject to a licensing requirement. ADD 113. However, as discussed previously, *supra* I., the contractor was unable to comply with such a regulation as no such license was available. APP 033 ¶¶20, 21, 22. Federal regulation cannot be consider comprehensive or pervasive if compliance is impossible; specifically when "bureaucratic nonfeasance [by the Secretary of Interior made] it impossible to obtain the federal trader's license[.]" *U.S. ex rel. Keith*, 634 F.2d at 403 (8th Cir. 1980).

The Tribe's decision to incorporate other federal entities does not establish federal involvement for purposes of federal regulation and control. The district court found that the inspections conducted throughout the construction process by tribal or federal entities evidences federal regulation and control. ADD 41-47. The tribe's decision, however, to request that inspections be performed

does not constitute regulatory control as there are no regulations to follow or standards to meet. Stephen Nelson, Royal River Casino & Hotel Compliance Officer, testified that IHS conducted inspections during and after the renovation. Nelson Testimony, Trial Transcript 469:3-12. Mr. Nelson further testified that there is no requirement to follow up on any deficiencies with anyone outside the casino. Nelson Testimony, Trial Transcript 471:1-14. The district court found that "all inspections and regulatory involvement during the Casino renovation were conducted by either federal or tribal agencies – not state agencies." ADD 44. However, none of these inspections were required by IGRA or any other federal statute. The tribe's choice to conduct these inspections and procure a federal entity, such as the Indian Health Service (IHS), to perform them does not establish federal regulatory control.

The voluntary use of federal entities, such as the IHS, to conduct inspections is materially different from cases like *Ramah* and *Bracker*. In *Ramah*, the Supreme Court determined that federal regulation of both "the construction and financing of Indian education institutions" was "comprehensive and pervasive." *Ramah*, 458 U.S. at 839. In particular, regarding the construction

of Indian Schools, the Supreme Court recognized that the BIA "must conduct preliminary on-site inspections, and prepare cost estimates for the project[.]" *Id.* at 841. Additionally, the BIA has broad authority to "monitor and review" the tribe's subcontracting agreements with the contractors, and may even require provisions such as bonding, pay scales, and preference for Indian workers. *Id.* at 841. Finally, pursuant to the regulations, the tribe must retain records for the Secretary of the Interior's inspection. *Id.* at 841. This level of scrutiny is substantially different than inviting an agency to inspect and choosing to comply with any recommendations.

Contact with other federal agencies does not constitute federal regulatory authority under IGRA. The district court further found that the financing process the tribe engaged in shows "federal regulatory involvement." ADD 48. The NIGC's review of the financing documents to ensure that they did not constitute gaming management contracts does not make the Construction Project subject to IGRA. *See Harrah's*, 243 F.3d at 439. The existence of a management contract may affect whether the "Indian tribe is the primary beneficiary of the gaming operation," where the imposition

of a contractor's excise tax does not. 25 U.S.C. § 2702(2). The NIGC's review was not of any construction plans, nor was NIGC required to approve any construction plans. Doc. 147 ¶15. Again, the intent of IGRA is to regulate gaming conduct and the courts should not expand this coverage. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1248 (11th Cir. 1999).

Tribal sovereignty is not impaired by the imposition of the contractor's excise tax. The district court errs in finding that the tax impairs the Tribe's ability to "generate gaming revenue in direct contradiction to IGRA's federal goals." ADD 55. IGRA's purpose is to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Nothing in IGRA, however, shows an intent by Congress to exempt non-Indian contractors from generally applicable taxes. *Ledyard*, 722 F.3d at 473. This is even more persuasive when this tax does not prevent the tribe from being the primary beneficiary of the gaming operation. *See* 25 U.S.C. § 2702(2).

Tribal sovereignty is maintained through the competitive bidding process. Dave Derry, chairman of Henry Carlson Construction, testified that they were contacted by the Tribe to

submit a bid for the project. Derry Testimony, Trial Transcript 487:10-15. They, along with others, submitted bids and, ultimately, were chosen to complete this project. Derry Testimony, Trial Transcript 488:17 – 489:6. In this instance, the non-Indian contractor was solicited by the Tribe, along with others, to bid on the construction project. The Tribe was then able to decide whether to enter into the construction contract, which did not require oversight by the BIA or any other federal agency. APP 032 ¶¶15-16.

Federal interest, for purposes of the *Bracker* test, is primarily a question of congressional intent. *Ledyard*, 722 F.3d at 472. There is nothing within IGRA that can be construed to show that Congress intended to exempt the imposition of a generally applicable contractor's excise tax on a non-Indian contractor renovating a casino. The district court erred when finding that IGRA provides such a federal interest.

B. Balancing of Tribal and State interests favors the State.

The district court erred in determining that the State's interests do not outweigh the tribal interests implicated by IGRA. The district court's determination that the "Tribe was deprived of at

least $1.24 million dollars in gaming revenue," is misleading for balancing purposes. ADD 65, 72. The amount of the tax at issue in this matter is $384,436. Exhibit 179. Testimony was received from Tim Morrissey, Senior Director of Operations at Royal River Casino, that this amount could purchase 19 additional slot machines. Morrissey Testimony, Trial Transcript 402:13-16. He further testified that he would estimate the revenue from 19 machines at approximately $1.2 million a year. Morrissey Testimony, Trial Transcript 403:10-12. Whether these machines would be purchased if the tax is not imposed and whether they would actually produce at the estimated amount is speculative. As such, the court should have only considered the actual amount of the tax owed.

The imposition of a state tax does not infringe on the Tribe's right to self-govern. The district court finds that because the Tribe was "forced" to put the amount of excise tax in escrow pending the outcome of this litigation, the State is impeding the Tribe's right to self-govern. ADD 68. The court implied that the lack of access to these dollars prevents funding of other interests. However, the State has a legitimate right to tax and merely reducing tribal

revenue does not invalidate a state tax. *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1116 (9th Cir. 1981), *opinion amended on denial of reh'g*, 665 F.2d 1390 (9th Cir. 1982). This is true even if, as a practical matter, the Tribe must forgo other opportunities because of the imposition of the state tax. *Id.* Justice Rehnquist, in his concurring opinion in *Colville*, stated that "[e]conomic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184, n.9 (1980) (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). Later, in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), the Supreme Court relied on Justice Rehnquist's statement when maintaining that the "downstream economic consequences" of a state tax on a tribe were insufficient to invalidate the tax. *Id.* at 114-15.

The district court further determined that the State was also interfering in the Tribe's ability to self-govern because of the lack of a tax collection agreement between the State and the Tribe. The testimony of Bobi Adams, South Dakota Department of Revenue Deputy Director of Administration, shows that each Tribe has the

ability to negotiate their own tax collection agreement. Adams Testimony, ADD 088-096. The State does not infringe upon the autonomy of the Tribe merely because both parties must impose the same taxes before it will enter an agreement deciding who will collect those taxes and how they will be distributed. The authority of the Department to enter into a tax collection agreement is granted by statute. *See* SDCL chapter 10-12A. By statute, the agreement may only provide for collection of tax types identical to certain state taxes identified. SDCL §10-12A-4. Such a requirement does not prevent the Tribe from negotiating and entering into a tax collection agreement implicating other taxes. Ms. Adams further testified that there is a tax collection agreement in place between the State and the Tribe that covers cigarette tax only. Adams Testimony, ADD 087.

The district court's finding that the imposition of the excise tax infringes on the exercise tribal self-government because they are not able to operate at the full capacity allowed in the current gaming compact is equally unsupported. ADD 70-71. The Gaming Compact was executed in 2016 and is in effect for a period of 10 years, with the opportunity to renew for subsequent 10-year

periods. ADD 58 ¶12. As such, the agreement allows for various levels of operations. ADD 057 ¶11. There are a multitude of reasons why the Tribe may not wish to operate at full capacity at this time. For instance, James McDermott, General Manager at the Royal River Casino, testified that the casino's main competition, Grand Falls Casino, started out with 800 slot machines and they are now down to 700. McDermott Testimony, Trial Transcript 442:20-22. This suggests that there may be an economic reason as to why that level of slot machine saturation is not beneficial.

The imposition of a two percent contractor's excise tax on an $18 million renovation project does not interfere with the Tribe's interest in economic development. The total amount of tax is $384,436. Exhibit 179. This amount was to be paid by the contractor as the work was completed, which was over a three-year period. Over that same period, the net Casino revenues were $6,881,012 for 2016; $7,504,807 for 2017; and $7,242,919 for 2018. *See* Exhibits 152, 157.[3] Additionally, the amount of the

[3] The district court, in footnote 5, explained the use of net revenue and utilized what is referred to in Exhibit 157 as "net cash from (continued. . .)

contractor's excise tax is included as a cost of construction, like sales tax and fuel costs incurred by the Contractor. Johnson Testimony, Trial Transcript 592:5-21. This amount was included in the contract for which the Tribe received financing. *See* Exhibits 24, 66. Therefore, this amount will be repaid over a 20-year period. APP 047 ¶83. Thus, the actual economic effect on the tribe is minimal. *See Ledyard*, 722 F.3d at 473.

The district court erroneously maintains that the State must show that the taxes collected for this project are used specifically for the Tribe, a specific tribal member, Henry Carlson Company, or their employees. ADD 73-76. "However, for a generally-applicable tax, a court may credit the services provided by the State to the Tribe more generally as "related" to the tax." *Ledyard*, 722 F.3d at 475. Through use of the general fund, the State provides a myriad of services that benefit the Tribe, tribal members, and Henry Carlson Company.

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noncapital financing activities." To promote consistency, the State utilizes the amounts identified similarly in the previous years.

The contractor's excise tax is deposited into the State general fund. APP 043 ¶48. The general fund is used to fund various services throughout the State, including in Moody County where the casino is located. Cody Stoeser, South Dakota Department of Education Director of Division of Finance and Management, testified that general fund dollars are used to fund the general operations of the school districts in South Dakota. Stoeser Testimony, Trial Transcript 1031:2-11. Neither the Tribe, nor the Bureau of Indian Affairs, operate an educational facility for children aged Kindergarten through 8th grade. Therefore, any tribal member or Henry Carlson employee who has a child younger than high school would benefit from the State's services. The Department of Education, through the use of general funds also provides storage and transportation of commodities dispersed through the USDA nutrition programs for school lunch and breakfast. Stoeser Testimony Trial Transcript 1033:22 - 1034:3. Heather Forney, South Dakota Board of Regents Vice President of Finance and Administration, testified that general funds are used to maintain the State's six regental colleges and two special schools, School for the Deaf and South Dakota School for the Blind and Visually

Impaired. Forney Testimony, Trial Transcript 887:12 - 888:13. Among other things, the Board of Regents has developed a strategic plan to increase tribal member graduates from the State colleges. Trial Transcript 892:14-893:23. These plans are not just to enroll Native American students, but to increase the percentage of actual graduates. Such educational services are not offered by the Tribe and the value to the Tribe of these services far outweighs the tax imposed.

The State also provides services, generally, to the Tribe, tribal members, and Henry Carlson Company. General fund dollars are used to provide matching state aid for various social services, such as children's health insurance, supplemental nutrition, and low-income energy assistance. Tidball-Zeltinger Testimony, Trial Transcript 1171:16-1172:6. State general funds help administer federal programs such as Medicaid. Tidball-Zeltinger Testimony, Trial Transcript 1173:9-13. All of these programs are available to tribal members and Henry Carlson Company employees who qualify financially.

The State has a recognizable interest in imposing the tax. "Raising revenue to provide general government services is a

legitimate state interest." *Yee*, 528 F.3d at 1192–93. The services provided are available to tribal members and employees of Henry Carlson Company. APP 033 ¶27. While the Tribe may also provide services, some are not available to non-tribal members. APP 033 ¶28. The services provided by the State benefit not only the tribal members and employees of Henry Carlson Company, but also the casino and its patrons. All South Dakota citizens benefit from multitude of services the State provides.

The contractor's excise tax is applied uniformly. The district court erroneously found that the tax was not uniformly applied. ADD 94-96. Bobi Adams testified that there are very few exceptions to the imposition to the contractor's excise tax in South Dakota. Adams Testimony, APP 068. Ms. Adams further testified that projects that occurred on Indian Country requires additional review as they may be subject to a tax collection agreement or imposition of the tax may be preempted by federal law. Adams Testimony, APP 072-078. If the Department of Revenue determines that federal law preempted the imposition of the tax, it would not be collected. Under a tax collection agreement, the contractor's excise tax would be collected from the contractor; however, based on the agreement,

a percentage would be returned from the Tribe. Because the tax is preempted in some cases or the disbursement was controlled under a tax collection agreement, does not mean it was not uniformly applied.

C. Sufficient nexus exists between tax collected and services provided.

Raising revenue is a legitimate state interest; however, such an interest is strongest when there is nexus between the taxed activity and the services provided. *Yee*, 528 F.3d at 1192-1193. In *Ramah* and *Bracker*, the court found that the federal interests implicated were so comprehensive that the State was left with no responsibilities. *Cotton*, 490 U.S. at 184-185. However, in *Cotton*, such federal interests were not implicated and the court recognized that the minimal burden to the Tribe does not outweigh the value of the services to the taxpayer (contractor) and the Tribe. *Id.* at 189-190. Such is the case here.

The State maintains a substantial interest in the regulation of construction. As previously stated, *supra* II.A., IGRA regulates gaming conduct not construction. The State regulates the business of construction. Henry Carlson Company, the taxpayer, conducts a

majority of its business off reservation and at the time of trial had no projects on a reservation. Derry Testimony, Trial Transcript 523:5-7. Henry Carlson Company is licensed to do business in the State. Dave Derry, chairman of Henry Carlson Company, testified that their projects comply with the standards of state inspectors whether the project is located on or off the reservation. Derry Testimony, Trial Transcript 533:4-534:11. As such, the State's regulatory services benefit Henry Carlson Company by maintaining their ability to conduct business in South Dakota and benefit the Tribe in assuring they received quality workmanship on their project. Even though the Tribe testified that adherence to state regulations was not required, the Tribe benefited by the contractor's uniform adherence to state standards.

The Contractor and the Tribe also benefitted from the services provided by the State's use of general funds. A majority of the Contractor's representatives are not tribal members and reside off the reservation. APP 031 ¶2. The Contractor does not have a permanent office on the reservation. APP 031 ¶3. Since the Tribe does not provide governmental services to non-Indians off reservation, Henry Carlson representatives only access to

governmental services is through those offered by the State. Furthermore, Dave Derry testified that he has accessed the Governor's Office of Economic Development publications, which can be a resource for additional business. Derry Testimony, Trial Transcript 522:6-16.

The State also provides a multitude of services with the funds collected from the contractor's excise tax that are available to all of the contractor's representative as well as the Tribe and its members. "The State generally must be able to show that it "seeks to assess [the] taxes in return for governmental functions it performs for those on whom the taxes fall."" *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1199 (10th Cir. 2011) (citing *Bracker,* 448 U.S. at 150, 100 S.Ct. 2578). The State provided evidence of education services, social services, health services, agricultural services, park services, veteran's services, environmental services, legislative services, and law enforcements services as well as the support required to maintain these services. Exhibit 1001. All are available to the contractor, its representatives, the Tribe, and tribal members. The Tribe's offering of services of their own does not negate the fact that its members

are eligible for the services that are maintained through the State's use of general funds. Furthermore, tribal government services are not generally available to non-tribal members like the contractor's non-Indian employees and representatives. APP 033 ¶27. There is no question that the tax assessed here provides valuable governmental services to those who are assessed the tax.

CONCLUSION

Neither the Indian trader statutes nor IGRA preempt the taxed activity—the Construction Project—and the State interests in imposing the tax outweigh any remaining tribal interests. As the contractor's excise tax is validly imposed on the non-Indian

Contractor, the State respectfully requests that the Court reverse the district court's judgment in favor of the Plaintiff.

Dated this 12th day of January 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellants' Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14-point type. Appellants' Brief contains 8,031 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016, and it is herewith submitted in PDF format.

3. I certify that the brief addendum submitted herein has been scanned for viruses and that the brief is, to the best of my knowledge and belief, virus free.

Dated this 12th day of January 2021.

/s/ Jeffery J. Tronvold
Jeffery J. Tronvold
Deputy Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of January 2021, a true and correct copy of Appellants' Brief and addendum was submitted to the Eighth Circuit Court of Appeals for review.

/s/ Jeffery J. Tronvold
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Deputy Attorney General